In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 991

TERRY INDUSTRIES OF VIRGINIA, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-3a) is reported at 403 F. 2d 633. The Board's decision and order (Pet. App. 5a-28a) are reported at 164 NLRB No. 117.

JURISDICTION

The decree of the court of appeals (Pet. App. 4a) was issued on December 9, 1968. The petition for a

writ of certiorari was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the findings of the National Labor Relations Board that the employer discharged two employees because of their union activity.

STATUTE INVOLVED

The revelant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set out at pp. 2-3 of the petition.

STATEMENT

Petitioner Company began the manufacture of camping trailers at Winchester, Virginia in February 1966 (J.A. 163; 76).[1] In July of that year, the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, began an organizing campaign. In August 1966, employees Orndorff and Funkhouser were discharged. A Board representation election was held on September 8, 1966 (J.A. 162-163; 20-22).[2]

The facts relating to the discharges are as follows:

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[1] "J.A." references are to the Joint Appendix in the court below.

[2] Of the ballots counted, an equal number were voted for and against the Union. The ballots of the two discharged employees were challenged, but will be counted if the Board's order is upheld.

1. Orndorff was active in the Union campaign. He solicited employees to sign authorization cards at the plant, and made his home available for a meeting of employees with a Union representative (J.A. 163, 167; 20-22, 36-37). On August 17, suffering from an infected jaw, Orndorff missed work (J.A. 163; 32). The next morning, still bothered by the jaw, he went to his dentist's office (J.A. 163; 32-33). At his request, the dentist's secretary called the plant to report that Orndorff was undergoing treatment and would be at work soon (J.A. 164; 32-33). When Orndorff reported to work a short time later, he learned that he had been discharged at 9 a.m. for violation of the Company's "24-hour" rule (J.A. 164; 33-35). That rule provided that an employee would be discharged if he failed to call the plant promptly on the second day of an absence (J.A. 164).[3]

The rule had not been applied mechanically in the past. One employee had not been discharged despite his failure to call in when absent three days in a row (J.A. 165; 105-109, 133); another was absent on Wednesday, Thursday and Friday, but was not discharged until he failed to report for work on the next Monday (J.A. 165; 115, 134). Three other employees were discharged on the third day of their absence (J.A. 165-166; 141, 143, 146, 150, 152-153, 157). Unlike Orndorff, who had been with the Company for six months, these last three had worked among them a total of eleven days (J.A. 165).

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[3] Orndorff had no telephone (J.A. 163; 111-112).

Production Manager Rusk placed a notation on Orndorff's employment record that, "Whenever this man is off he never calls in. He has been doing this since employment" (J.A. 166-167; 145). When asked to explain the notation, Rusk could recall only two prior occasions when Orndorff had been absent (J.A. 166; 98). On one of those occasions, he had sent timely word of his absence; on the other, his car had broken down on the way to work (J.A. 166; 40, 98-99).

2. Funkhouser was one of the Company's original employees, and had been promoted to the position of leadman in June because of his proficiency (J.A. 170; 8-9). He, too, was instrumental in starting the Union's organizational campaign; he solicited most of the authorization cards, and advised Union counsel at the Board's representation proceeding (J.A. 162; 2-3, 5-6, 20-22, 38). When he asked Production Manager Rusk for permission to attend the representation hearing, Rusk remarked, "So you're the one? Why don't the employees out here pick someone in the plant to represent them instead of the Union?" (J.A. 169, n. 6, 170; Tr. 45). Two days later, on August 11, Rusk told Funkhouser that another employee, Ray Knight, had complained that he was "popping off" around the plant (J.A. 171; 116), and wrote on Funkhouser's record (J.A. 171, 138):

> I have had this man in my office, talked to him about his job. He was told to stay in his own department but did not. He was told not to cut out anything for anybody other than company

work. He was told not to let anyone use the saws other than those assigned to them.

But at the Board's unfair labor practice hearing, Rusk admitted that, after talking to Funkhouser, he was satisfied of his innocence and convinced that Knight was responsible for creating the turmoil in the plant (J.A. 171; 117-119); and that the above notation actually referred to an incident which allegedly occurred a week earlier (J.A. 120-121). Rusk had learned that employee Bowen had asked another employee to stain some "whatnots" (small decorative items cut from wood for the employee's own use) and asked Funkhouser if he knew anything about the matter. When Funkhouser denied any knowledge of it, Rusk told him that no one was to cut out whatnots. (J.A. 171-172; 81, 119) Nothing was said to Bowen on that occasion (J.A. 119-120).

On August 22, Funkhouser found a board with a partially cut out pattern lying on his work table when he returned from a regular break; within a few seconds, he finished sawing out the pattern (J.A. 173; 15-17) The next morning, he was discharged.[4] Production Manager Rusk noted on Funkhouser's employment record, "Did not do job as to instructions, sawing whatnots on Company time" (J.A. 173; 83). Sometime after the discharge, at the suggestion of a "man from California," Rusk added to Funkhouser's record the comment, "Seemed to fall apart efficiency and responsibility wise" (J.A. 174; 84, 138).

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[4] The whatnot had been left at Funkhouser's desk by employee Bowen, who was also discharged (J.A. 173; 87-88).

3. On these facts, the Board found that the reason given for Orndorff's discharge was a false one,[5] and inferred from that fact, Orndorff's leading role in the Union campaign, and the other surrounding circumstances that he was really discharged because of his Union activity, in violation of Section 8(a)(3) and (1) of the Act (Pet. App. 15a-23a). In the light of Rusk's effort to build a case against Funkhouser the day after he appeared at the Board representation hearing and the fact that he was discharged shortly after the unlawful discharge of Orndorff, his friend and Union associate, the Board also found that Funkhouser had been discharged for his union activity, in violation of the Act (Pet. App. 19a-21a, 23a). Finally, the Board found from other acts that the Company had created the impression of surveillance of the employees' union activities, thereby violating Section 8(a)(1) of the Act (Pet. App. 21a-23a). The Board ordered the Company to cease and desist from the unfair labor practices found, to offer Orndorff and Funkhouser reinstatement to their former or substantially equivalent positions, and to make them whole for lost wages (Pet. App. 24a-26a). The court of appeals sustained the Board's findings, and enforced its order (Pet. App. 1a-3a).

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[5] As the Board stated (Pet. App. 13a), "it would strain credulity to the breaking point to find that an employer discharged a man who had been undergoing medical treatment and who was 2 hours late in apprising the employer of this fact * * *."

ARGUMENT

The only question presented by the petition is whether substantial evidence supports the Board's finding that the Company discharged employees Orndorff and Funkhouser because of their union activities, in violation of Sections 8(a)(3) and (1) of the Act. The court of appeals found that the record adequately supported the Board's inference and findings; the issue does not warrant re-examination by this Court. *National Labor Relations Board* v. *Pittsburgh Steamship Company*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. The court's opinion considers the Company's principal defenses and shows that it reviewed the entire record, for it found "substantial evidence in the record as a whole to support the Board's findings" (Pet. App. 1a-2a). The court was not required to go to the extreme of discussing every piece of evidence petitioner relied on. In any event, the facts summarized above show that the Board was fully justified in concluding that the reasons advanced by the Company to explain the discharges were pretexts, and that the real reason for the terminations was the employees' union activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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